

MEMORANDUM

Date: November 11, 2001

FOR: Olga Kebis

FROM: Meggan Engelke-Ros
Office of General Counsel for Environmental Compliance

SUBJECT: The Federal Tort Claims Act (FTCA) and The Federal Employees' Compensation Act (FECA)

I. What Are These Statutes?

Under the doctrine of Sovereign Immunity, citizens of the United States were barred from bringing suits against the government except in cases where the government agreed to be sued.¹ This changed in 1946 with the passing of the Federal Tort Claims Act² (FTCA). FTCA “was designed to allow recovery of damages against the federal government to those suffering harm from what, except for the traditional immunity, would be the tortious conduct of its employees.”³

The Federal Employees Compensation Act⁴ (FECA) functions in much the same way as Workers' Compensation in the private sector. FECA provides a schedule of compensation to be paid to Federal

¹ RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 954 (1995).

² 28 U.S.C. § 2671 *et seq.*

³ EPSTEIN, *supra* at 954.

⁴ 5 U.S.C.S. § 1801 *et seq.*

Employees who are injured or killed in the course of their duties.⁵

II. How Do The Federal Tort Claims Act (FTCA) and The Federal Employees Compensation Act Limit (FECA) Liability Generally?

An important point to make with regard to all the issues addressed in this memo relates to the limitations that exists both on Federal Government liability, with respect to employees, and on Federal Employee liability, with respect to the general public and to other employees.

Under FECA,⁶ federal employees who are injured or killed in the course of their duties are generally limited from seeking any remedy outside the structure of FECA. Therefore, the Federal Government has no liability under any other federal remedial statutes, such as FTCA, for injuries which are compensable under FECA.⁷ While FECA may be seen as limiting the extent of Federal Government liability by controlling the amount of employee compensation,⁸ because employer negligence need not be shown and employee negligence does not bar recovery,⁹ the statute allows for compensation in a broad range of situations where recovery may not have been available at common law.

Under FTCA, individual government officials are immune from state tort liability for conduct that falls within their scope of duties and is discretionary in nature.¹⁰ This means that a Federal employee discharging official duties, and thereby making decisions within the scope of his or her employment, is generally free from liability associated with death or injury resulting from his or her decision. “Scope of Employment” is meant to be interpreted fairly broadly and would not necessarily limit an employee’s immunity to duties that are specifically enumerated in that employee’s job description. Rather, any discretionary action reasonably arising from an individual’s employment would be included. The exception is when the employee acts with wanton disregard for health and safety or gross negligence.

⁵ Obviously, in instances where employees are killed, compensation is paid to their heirs.

⁶ 5 U.S.C.S. § 1801 *et seq.*

⁷ McCall v. United States, 680 F. Supp. 283, 284 (S.D. Ohio 1987) *citing* Baker v. Barber, 673 F. 2d 147 (6th Cir. 1982); Lance v. United States, 70 F. 3d 1093 (9th Cir. 1995).

⁸ 5 U.S.C. § 8107.

⁹ 5 U.S.C.S. § 8102 (a).

¹⁰ Westfall v. Erwin, 108 S. Ct. 580 (1988). The FTCA also provides for additional exceptions, not applicable here, as well as limitations on the type of damages that may be recovered. *See* EPSTEIN *supra* at 954.

III. Might Liability Arise Under FECA or FTCA In Specific Situations?

Many questions have come from the field about liability attaching to individual NWS employees in various situations, including the following:

- Injury or Death of NWS Employee Resulting from Failure of Structural Support;
- Injury or Death of NWS Employee Resulting from Deviation from Safety Procedure in Emergency Situation;
- Injury or Death of Trained Employee Attempting to Extinguish Fire;
- Injury or Death of Individual Receiving CPR or First Aid from Trained Employee; and
- Injury or Death Resulting from Suspension of Lock-Out/Tag-Out Procedures When Station Manager has Determined that “Continuity of Service” is Essential.

Some of these questions have been raised in the context of the Occupational Safety and Health Act¹¹ (OSHA). OSHA applies only to employers. However, OSHA does require employees to “comply with occupational safety and health standards and all rules, regulations, and orders pursuant to this Act which are applicable to his own actions and conduct.”¹² That being said, in the case of employee failure to comply with OSHA regulations resulting in injury to the employee himself/herself, it is difficult to see how any liability could attach to the employee. There must be injury to another for liability to attach. An employee injured in any of the scenarios mentioned above would be able to recover under FECA, even if that employee’s conduct was negligent.¹³

A. Injury or Death of NWS Employee Resulting from Failure of Structural Support

The issue has been raised by NWS field personnel that they are not qualified to assess the support capacity of a given attach point and that the NWS towers are not equipped with placards certifying that

¹¹ 29 U.S.C. § 651 *et seq.*

¹² 29 U.S.C. § 654 (b).

¹³ 5 U.S.C.S § 8102 (a). However, employees may be barred from claims under FECA for certain types of willful misconduct.

they meet OSHA standards.¹⁴ An employee who was killed or injured in such a scenario, or in any fall sustained in the course of duty, would be eligible for compensation under FECA regardless of their own negligence.

NWS is required to comply with OSHA,¹⁵ however the agency's liability for employee injury or death is limited by FECA. Similarly, as was discussed above, the liability of individual managers would be limited by FTCA.

B. Injury or Death of NWS Employee Resulting from Deviation from Safety Procedure in Emergency Situation

As was discussed at the beginning of this memo, agency liability for employee injuries sustained in the course of duties is limited by FECA.¹⁶ In addition, individual employees are immune from state tort liability for injuries to others resulting from decisions or discretionary conduct that fall within the scope of their duties.¹⁷

The specific example of suspension of lock-out/tag-out procedures is addressed at the end of this memo.

C. Injury or Death of Trained Employee Attempting to Extinguish Fire

OSHA requires employers to make fire protection and suppression equipment available.¹⁸ A trained employee killed or injured while attempting to fight a fire would be able to collect under FECA.

¹⁴ See memorandum on Fall Protection for more information about these standards.

¹⁵ Although excluded by direct regulation by definition, Federal agencies are required, under OSHA, to provide their employees with "healthful and safe places and conditions of employment." (See 29 U.S.C. § 668 (a)(1)). In addition, Executive Order 12580 provides that Federal agencies must comply with OSHA standards unless the Secretary of Labor has approved an alternative standard. *For more information on OSHA issues, please see the separate legal memorandum on OSHA compliance.*

¹⁶ McCall v. United States, 680 F. Supp. 283, 284 (S.D. Ohio 1987) citing Baker v. Barber, 673 F. 2d 147 (6th Cir. 1982); Lance v. United States, 70 F. 3d 1093 (9th Cir. 1995).

¹⁷ Westfall v. Erwin, 108 S. Ct. 580 (1988).

¹⁸ 29 C.F.R. §1910.157 (c).

As was mentioned above, NWS is required to comply with OSHA,¹⁹ however the agency's liability for employee injury or death is limited by FECA. Similarly, as was discussed above, the liability of individual managers would be limited by FTCA.

D. Injury or Death of Individual Receiving CPR or First Aid from Trained Employee

When the facility or worksite is in a remote location, OSHA requires employers to provide personnel, at the worksite, who have been adequately trained in CPR/first aid.²⁰ Questions have been raised by field personnel about what liability might attach if death or injury results from the administration of CPR/first aid to other NWS employees and/or members of the general public.

In the first scenario, a trained NWS employee has undertaken to provide CPR or first aid to another employee and death or injury results. In this scenario, FTCA would protect the employee administering first aid/CPR from liability as long as the employee acted without gross negligence or wanton disregard for the other employee's safety. Basically this means that, as long as the trained employee made a good faith effort to administer CPR/first aid, even if his/her action result in the death or injury of the individual they were attempting to save, the employee would be protected from liability under FTCA.

In the second scenario, a trained NWS employee has undertaken to provide CPR or first aid to a member of the general public, away from any NWS facility and outside the employee's scope of duty,²¹ and death or injury results. This is a difficult issue to address because, in this scenario, the employee would be acting as a private citizen and the law varies from state to state. In many states, "Good Samaritan" statutes have been enacted to protect individuals who undertake the emergency care of their fellow citizens, provided that such care is given in good faith and without gross negligence or willful misconduct.²² More specific guidance regarding the private conduct of NWS employees and possible

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²⁰ Although OSHA's regulations on Medical Services and First Aid at 29 C.F.R. § 151 do not require employers to provide training in Cardiopulmonary Resuscitation (CPR), "OSHA's 'Guidelines for First Aid Training Programs' recommends that CPR training be a general program element of a first aid program. *See* OSHA interpretation Letter to the Honorable James C. Greenwood, April 15, 1999.

²¹ It should be kept in mind that "scope of duties" is meant to be interpreted fairly broadly.

²² RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 575 (1995).

resulting liability is outside both the role of the Office of General Counsel and the scope of this memorandum.

E. Injury or Death Resulting from Suspension of Lock-Out/Tag-Out Procedures When Station Manager has Determined that “Continuity of Service” is Essential.

OSHA regulations require the control of hazardous energy (lock-out/tag-out) during the course of “service or maintenance of machines or equipment in which the unexpected energization or start-up of the machines or equipment, or release of the stored energy could cause injury to employees.”²³ The regulations do provide for exceptions to the requirements under certain circumstances, including with respect to hot tap operations delivering steam or fuel via pressurized pipelines when the employer demonstrates that “(1) continuity of service is essential (2) shutdown of the system is impractical; and (3) documented procedures are followed, and special equipment is used that will provide proven protection for employees.”²⁴

While NWS operations do not fall into this specific exemption, an argument could be made that some particularly vital NWS function might be analogous. In that case, a determination on the part of a station manager, that “continuity of service” is essential, must be accompanied by a determination that shutdown of the system is impractical. In addition, a plan must be in place at each facility to address this eventuality, enumerating criteria for making the required determinations and providing for alternative procedures to be followed in the absence of lock-out/tag-out. Finally, protective equipment must be made available and these new emergency procedures should be covered in the lock-out/tag-out training required by OSHA.²⁵

A further question has been raised regarding the possibility of personal liability attaching to the station manager for making the determination that continuity of service is essential. Under FTCA, liability would only attach if the determination was found to have been made either outside the scope of the manager’s official duties or with gross negligence or wanton disregard for health and safety.

The provision of weather information is essential to the health, safety and welfare of the general public. In making the determination as to whether continuity of service is essential, NWS station managers are weighing the benefits of following the lock-out/tag-out procedures outlined in the EHB-15, to protect the safety of an employee, against the risk of death or injury to the general public should they be deprived or timely, accurate weather information.

²³ 29 C.F.R. § 1910.147 (a).

²⁴ 29 C.F.R. § 1910.147 (a)(iii)(B).

²⁵ 29 C.F.R. § 1910.147 (c)(7).

Because this determination clearly lies within the station manager's scope of duties, the question of liability would turn on the wanton disregard/gross negligence exception to the general immunity provided by FTCA. The trier of fact (e.g., jury) would step into the shoes of the station manager and decide whether the determination was a reasonable one or one that demonstrates gross negligence or wanton disregard for health and safety.

For example, if no serious weather incident were at hand, the trier of fact could find that continuity of service could not be reasonably found to be essential and the station manager could be found liable for a decision to bypass lock-out/tag-out procedure that resulted in the death of an employee. However, if continuity of service was essential, it is likely that the trier of fact would find the Station Manager's decision was reasonable and, therefore, immune from liability under FTCA.